
**APPEALS BOARD
UTAH LABOR COMMISSION**

DEBRA ANN DOMINGUEZ,

Petitioner,

vs.

**KENNECOTT UTAH
COPPER CORPORATION,**

Respondent.

**ORDER ON MOTION
FOR REVIEW**

ORDER OF REMAND

Case No. 8-03-0839

Debra Ann Dominguez asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge La Jeunesse's summary dismissal of her complaint alleging Kennecott Utah Copper Corporation discriminated and retaliated against her in violation of the Utah Antidiscrimination Act, Title 34A, Chapter 5, Utah Code Annotated.

The Appeals Board exercises jurisdiction in this matter pursuant to Utah Code Annotated § 63G-4-301 and § 34A-5-107(11).

BACKGROUND AND ISSUE PRESENTED

Ms. Dominguez filed a complaint with the Utah Antidiscrimination and Labor Division ("UALD") alleging that she was subjected to gender discrimination while employed by Kennecott. Ms. Dominguez's complaint further alleged that Kennecott terminated her employment in retaliation for complaining about the discrimination. After an investigation, UALD dismissed Ms. Dominguez's complaint. Ms. Dominguez then requested an evidentiary hearing, as permitted by the Utah Antidiscrimination Act. However, prior to the hearing, Kennecott moved for summary dismissal of Ms. Dominguez's complaint. Judge La Jeunesse granted the motion and dismissed Ms. Dominguez's claims against Kennecott with prejudice.

Ms. Dominguez now requests review of Judge La Jeunesse's decision. Ms. Dominguez argues that Judge La Jeunesse failed to view the disputed facts in the light most favorable to her claims and that material issues of fact remained in dispute. For these reasons, Ms. Dominguez contends that Judge La Jeunesse erred in summarily dismissing her claims without an evidentiary hearing.

FINDINGS OF FACT FOR PURPOSES OF SUMMARY JUDGMENT

In considering whether summary judgment was appropriate in this case, the Appeals Board must view the disputed facts in the light most favorable to Ms. Dominguez. When viewed in that light, the facts are as follows:

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1. In February 2000, Ms. Dominguez began working for Kennecott in what was generally referred to as the “Tank House.” In the Tank House, it was common for employees to engage in swearing, teasing, sexual discussions, and joking—including racially motivated jokes. Ms. Dominguez admits that when Nehemiah Blake, a black coworker and friend, directed racial insults and jokes at her because she is Mexican, she responded with derogatory racial jokes directed at him.

2. By January 2003, their friendship ended and Mr. Blake began spreading rumors about Ms. Dominguez at work and calling her insulting names like Hag and, on at least one occasion, “stupid bitch.” In mid-March of 2003, Ms. Dominguez called Kennecott’s Human Resources Manager, Bryan Pett, to complain about this harassment, but she was discouraged from making a formal complaint. Then, on or about March 17, 2003, Mr. Blake’s harassment escalated when she crossed the lunchroom and he called out “Hag” multiple times. Ms. Dominguez filed a formal complaint with Mr. Pett that Mr. Blake was harassing her because of her sex.

3. Kennecott conducted an investigation into Ms. Dominguez’s allegations but found no corroboration of her claims. During this investigation, however, Kennecott discovered Ms. Dominguez’ racial comments directed towards Mr. Blake and began a separate investigation into Ms. Dominguez’ conduct.

4. Kennecott terminated Ms. Dominguez’s position on March 28, 2003, two weeks after Ms. Dominguez filed her complaint of harassment. The termination notice stated that she was terminated because she had “made threatening statements about doing harm or wishing harm on employees and their families” and “referred to a fellow employee using racial slurs.”

5. Ms. Dominguez admits that she made jokes and referred to Mr. Blake in racially derogatory terms; however, she denies that she made these comments because she is racially biased, but rather because it was part of the banter that was commonly exchanged between them. Ms. Dominguez also admits that during a meeting with three managers she stated that she wished something would happen to Mr. Blake’s daughter so Mr. Blake would suffer anguish as she had.

6. With respect to Ms. Dominguez’s threatening statements, Kennecott cites as undisputed fact three incidents of Ms. Dominguez’s making threatening comments: (1) during a conversation with Mr. Pett when she expressed a wish that something bad would happen to Mr. Blake’s daughter; (2) when she met with Mr. Pett and two other managers about her complaint and she again stated she wished something would happen to Mr. Blake’s daughter so Mr. Blake would suffer; and (3) when in a phone conversation with Mr. Pett she said; “I’ve had a lot on my mind. So much so, that my brother took away my gun because I might go postal.”

7. Ms. Dominguez has admitted to the second incident but denies the first accusation—that she made the wish of harm in a separate conversation with Mr. Pett—and the third accusation—that she made the “postal” comment. The Appeals Board has reviewed the pleadings and finds that they support Ms. Dominguez’s assertion that there are material facts in disputes. Since this is a review of

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a summary judgment dismissal, these disputed facts must be viewed in the light most favorable to the non-moving party. Therefore the Appeals Board must view Ms. Dominguez's denials as true and find as fact that the only "threat" she made was during the meeting with the three managers when she "wished harm" on Mr. Blake's family so he could feel anguish.

8. Shortly after being terminated, Ms. Dominguez's attorney requested that she prepare a statement regarding Kennecott's cited reasons for her termination. In compliance with her attorney's request, she prepared a handwritten note, titled "Why i[sic] think they let me go."

9. Ms. Dominguez's employment at Kennecott was subject to a collective bargaining agreement. The agreement provides that before an employee can be subject to any discipline, Kennecott must give an employee notice of any investigation, an opportunity to dispute allegations, and progressive discipline as appropriate. Ms. Dominguez points to Kennecott's actions with respect to three other employees to show that, with her, Kennecott acted contrary to the collective bargaining agreement and its own standard practices of affording an employee prior warning or an opportunity to respond to charges before being terminated.

DISCUSSION AND CONCLUSION OF LAW

Section 63G-4-102(4)(b) of the Utah Administrative Procedures Act allows parties to adjudicative proceedings before the Commission to move for summary judgment according to the standards established in Rule 56 of the Utah Rules of Civil Procedure. In turn, Rule 56 provides that summary judgment may be granted if the adjudicative record shows "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In considering a motion for summary judgment, the Commission and its ALJs are required to view the evidence in the light most favorable to the party against whom summary judgment is sought.

Ms. Dominguez claims she was subjected to gender motivated harassment and retaliation for filing a complaint of harassment, both of which are unlawful under the Utah Antidiscrimination Act and Title VII of the Civil Rights Act. To establish a case under either of these claims, Ms. Dominguez must satisfy the burden-shifting standards set forth by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 793 (1973). First, an employee must establish the prerequisite prima facie elements for each basis of discrimination. After the employee has set forth a prima facie case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for its adverse action(s) against the employee. The burden then shifts back to the employee to show that the employer's articulated reason is actually a pretext for discrimination, i.e., unworthy of belief. If the employee is successful in showing the employer's explanation was a pretext for discrimination, discrimination is established. See McDonnell Douglas, 411 U.S. at 802-804; University of Utah v. Industrial Commission, 736 P.2d 630, 635 (Utah 1987); Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997).

In granting Kennecott's motion for summary dismissal, Judge La Jeunesse found that even if

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Ms. Dominguez established a prima facie case for each claim of discrimination alleged, she cannot show that Kennecott's explanation for her termination, that she made racial comments and threats, was pretext since Ms. Dominguez conceded those were the reasons she was let go in her note, "Why i think they let me go."

In her pleadings, Ms. Dominguez has proffered a different explanation of the note; namely, that it was nothing more than her impression of the reasons Kennecott was using for terminating her. While Ms. Dominguez's explanation of the meaning of her note may not withstand the scrutiny of an evidentiary hearing, it cannot be rejected in a motion for summary judgment. To the contrary, Ms. Dominguez's note must be viewed in the light most favorable to her. Thus, the Appeals Board views the note for what she explains it to be, a description, for the benefit of her attorney, of events that Kennecott used to explain her termination—not as an admission precluding her from proving Kennecott's explanation was pretext for discrimination.

Nevertheless, returning to Ms. Dominguez's burden of establishing a prima facie case of discrimination based on gender harassment, the Appeals Board does not find that Ms. Dominguez has established the prima facie elements necessary for a claim of gender harassment. To establish a case for hostile work environment based on gender, one of the essential elements that Ms. Dominguez must demonstrate is that the alleged harassing conduct was sufficiently severe or pervasive as to alter the terms and conditions of her employment, thereby creating a hostile work environment. Even assuming that Ms. Dominguez could prove that she was subject to the comments that she alleged, the Appeals Board does not find that the comments were "severe or pervasive" enough to alter the terms and conditions of her employment. Thus, the Appeals Board affirms dismissal of Ms. Dominguez's claim for hostile work environment harassment based on her gender.

The Appeals Board does find, however, that based on the pleadings, Ms. Dominguez has set forth a prima facie case of retaliation sufficient to withstand summary judgment. To establish a prima facie case for retaliation, Ms. Dominguez must show there is a causal connection between the protected activity and the adverse employment action. Appellate courts have found that the date of a complainant's termination may be key to the causation inquiry because the closer it occurred to the protected activity, the more likely it will support a showing of causation. In Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999), the court stated:

We have held that a one and one half month period between protected activity and adverse action may, by itself, establish causation. By contrast, we have held that a three month period, standing alone, is insufficient to establish causation.

The evidence is undisputed that Ms. Dominguez was terminated within two weeks of her filing her complaint of harassment. The Appeals Board finds that the close temporal proximity between these two events is sufficient to show causation for purposes of summary judgment.

To overcome her final burden of showing that Kennecott's proffered explanation for her

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termination was pretext, Ms. Dominguez's argument was two-fold: (1) that Kennecott fabricated events to bolster its claim she was fired for inappropriate conduct, and (2) that others accused of similar conduct were given rights inherent in the collective bargaining agreement and of Kennecott's standard practices that she was not given. Viewing the facts in the light most favorable to Ms. Dominguez, the Appeals Board finds that Ms. Dominguez has asserted sufficient facts to support her claim that Kennecott's explanation for her termination was pretext for discrimination sufficient for summary judgment purposes. The Appeals Board concludes that Ms. Dominguez has stated a claim for discrimination sufficient to withstand summary dismissal of her retaliation claim.

ORDER

The Appeals Board affirms Judge La Jeunesse's summary dismissal of Ms. Dominguez's gender harassment claim, and sets aside Judge La Jeunesse's summary dismissal of Ms. Dominguez's retaliation claim. The Appeals Board remands the matter to Judge La Jeunesse for further proceedings consistent with this decision. It is so ordered.

Dated this 30th day of September, 2008.

Colleen S. Colton, Chair

Patricia S. Drawe

Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.